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ALEXANDER L. STEVAS,
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No. 84-552

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOSEPH H. STANZIANI, et al.,
Petitioners

v.

KASEEM COLEMAN, et al.,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS WHY THE WRIT SHOULD BE DENIED

Over two years after the commencement of this action and prior to trial, petitioners moved in the district court for judgment on the pleadings under Fed. R. Civ. P. 12(c) based on a trio of

abstention doctrines: Younger v. Harris, 401 U.S. 37 (1971); Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); or Burford v. Sun Oil Co., 319 U.S. 315 (1943).

The district court denied the motion for judgment on the pleadings (Appendix 12a) and petitioners filed an interlocutory appeal. After briefing and oral argument and a nine month delay in the proceedings, the Court of Appeals for the Third Circuit dismissed petitioners' appeal as interlocutory and not taken from a final judgment within the meaning of 28 U.S.C. §1291. (Appendix 63a). Petitioners now seek certiorari from this order.

SUMMARY OF ARGUMENT

This petition for writ of certiorari should be denied because the dismissal of

the appeal by the Court of Appeals was required by prior decisions of this Court applying the final judgment rule and is not in conflict with any judicial ruling. This case presents no new issues of law. A denial of a motion for judgment on the pleadings is the classic example of a nonappealable interlocutory order. In addition, the order in this particular case does not warrant the attention of this Court because petitioners' claim that this case warrants extraordinary relief has no basis in the record.

The petitioners' request for grant of certiorari on the merits of the district court's order must also be denied both because the Court of Appeals did not address that issue and because the decision of the district court was not erroneous and was premised upon an exercise of discretion and findings of

fact.

ARGUMENT

I. The writ must be denied because the dismissal by the Court of Appeals of the interlocutory appeal was required by prior decisions of this Court.

The decision of the Court of Appeals dismissing petitioners' interlocutory appeal was required by prior decisions of this Court which have applied the final judgment rule and the collateral order doctrine set forth in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949). Under Cohen, in order to qualify as a final collateral order, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from final

judgment." Firestone Tire and Rubber Co. v Risjord, 449 U.S. 368, 375 (1981), quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

As the Court of Appeals found, the order denying petitioners' Rule 12(c) motion for judgment on the pleadings satisfied none of the three Cohen criteria. (Appendix 8a). The most critical and glaring absence is that of the third component-- abstention claims have always been and remain capable of review after final judgment. This case is no different.

A. Petitioners' claims are reviewable on appeal after final judgment.

In order to justify their claim of unreviewability, petitioners create for themselves a "right" not to undergo a trial in federal court. Defendants in

this action, however, unlike those in cases cited by petitioners, have no immunity from participating in a trial when plaintiffs allege their conduct to be unconstitutional and seek injunctive relief. In effect, what petitioners attempt to do by asserting a right to avoid trial is overturn the line of cases ending in Pulliam v. Allen, 104 S.Ct. 1970 (1984), holding that judicial officers are not immune from suit for injunctive relief. This case thus presents nothing new.

Moreover, petitioners' categorization of themselves as "judicial authorities" is misleading. In fact, the primary defendants are probation officers who are entitled only to a qualified immunity even from a damage action under the "functional" approach to immunity law articulated by this Court in Harlow v.

Fitzgerald, 457 U.S. 800, 810 (1982). See, Ray v. Pickett, 734 F.2d 370, 372 (8th Cir. 1984); Galvon v. Garmon, 710 F.2d 214, 215 (5th Cir. 1983); Wolfel v. Sanborn, 691 F.2d 270, 271 (6th Cir. 1982), cert. denied, ___U.S.___, 103 S.Ct. 751 (1983). See also, Thompson v. Burke, 556 F.2d 231 (3d Cir. 1977).

Petitioners' argument that the denial of their motion for judgment on the pleadings is unreviewable on appeal deliberately confuses the question of what is a final judgment with the particular facts and claims set forth within that motion. For example, petitioners' dire warnings and the ritualistic repetition of the words "comity" and "federalism," intended to appeal to this Court's sensitivity to the relationship between federal and state judiciaries, are really an effort to

reargue the merits of the abstention claims. Petitioners' assertions, however, do not support an abrogation of the final judgment rule. There will obviously be no injunctive relief against state judicial officers or payment of attorneys' fees until and unless plaintiffs prevail at trial and that final judgment -- as well as the district court's decision not to abstain -- are upheld on appeal.

Petitioners' further argument to this Court that review must be made at this stage because of the possibility that some defendant might be cited for contempt is also, to say the least, premature. Petitioners conjure up a "worst-case" scenario that has no basis in reality. Indeed, all of petitioners' arguments ignore one of the underlying premises of the final judgment rule: the

lower courts may find that the challenged statute and the challenged practices are constitutional. Consideration of this case at this time is premature and unnecessary.

B. This case should not be treated differently than others in which this Court has refused to make ad hoc exceptions to the final judgment rule.

This case is no different than the scores of others that have preceded it in which abstention claims have been raised. As this Court stated in U.S. v. MacDonald, supra:

> "Appeal rights cannot depend on the facts of the particular case." Carroll v. United States, 354 U.S. 394, 405 (1957). The factual circumstances that underlie a speedy trial claim, however "extraordinary," cannot establish its independent appealability prior to trial. Under the controlling jurisdictional statute ..., the federal courts of appeals have power to review only "final decisions," a concept that Congress defined "in terms of categories."

Carroll v. United States, 354 U.S. at 405.

Id., 435 U.S. at 857 fn. 6.

Just as a particularly sympathetic speedy trial claim, U.S. v. MacDonald, supra, or a particularly egregious case of vindictive prosecution, U.S. v. Hollywood Motor Car Co., 458 U.S. 263 (1982), will not warrant the creation of a further exception to the final judgment rule, the claim that this motion for judgment on the pleadings is really a case where abstention is appropriate cannot justify upsetting orderly judicial process and introducing uncertainty into an area of law where certainty has existed before. The reliance on particular facts of particular cases rather than on categories of cases will simply encourage litigants to seek to fit their individual cases within the strictures of this new exception and

result in the disruption of dockets of both the trial courts and courts of appeals.

C. This is a particularly inappropriate case to consider for an exception to the final judgment rule.

Even if further exceptions to the final judgment rule were warranted, this is a most inappropriate case for such an exception.

First, there is no evidence of record to support petitioners' assertions about the drastic effect of this case on the state judiciary. Petitioners could have built a record on this issue but did not. They failed to file a motion with the district court to certify the question as a controlling question of law with respect to which there is a

substantial ground for difference of opinion under 28 U.S.C. §1292(b). If petitioners had filed such a motion, they could have supported with evidence their assertions of dire consequences to the state system. Instead, petitioners, without any record, now rely on bald assertions that the mere existence of this lawsuit, unlike others, undermines the "dignity and integrity and public trust in the state judicial system." (Petition for Certiorari, p. 20) Even assuming that these assertions had some basis in reality, any alleged erosion of public trust can be adequately addressed on appeal after final judgment.

Petitioners' additional complaints, such as their assertion that the burdens of discovery require their interlocutory appeal be heard, are without basis. Defendants filed no

timely objections to any discovery sought and have failed to answer even one interrogatory. (And, of course, if the district court abstained, defendants would still be subject to discovery in any separate state court proceeding).

Second, petitioners do not argue-- nor could they on this record-- that there will be an actual interruption of state proceedings here, even after a final order is entered. Plaintiffs do not seek intervention in any ongoing juvenile case as the cases of the named plaintiffs came to an end soon after the complaint was filed. As in Gerstein v. Pugh, 420 U.S. 103 (1975), state proceedings continue without interference because of the collateral nature of plaintiffs' constitutional challenge.

Third, petitioners' motion for judgment on the pleadings was denied in

part because of petitioners' inexcusable delay in waiting to file the motion until the eve of trial. The discretionary denial of their motion on this ground hardly merits the attention of this Court. See, Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974); Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

Fourth, petitioners argue not with the analytical framework applied by the district court in addressing their abstention claims, but rather with the court's exercise of discretion and with its detailed findings concerning the adequacy of state court remedies. This case thus presents no important question of law warranting this Court's attention but rather only a request to review the application of already settled standards

to a particular factual situation.

Last, as explained above, defendants below include more than judges. In fact, the primary defendants are probation officers who detain children without a hearing, and a county (a political subdivision). Whether plaintiffs will be successful in their claims against the judges and, if so, whether the relief granted will be intrusive, has obviously not yet been decided. The consideration of these matters may prove to be unnecessary if this case is permitted to proceed in an orderly fashion to final judgment. Moreover, plaintiffs seek not only injunctive relief, but also a damage award against the non-judicial defendants. Petitioners' arguments ignore the fact that a major portion of the district court's ruling addressed relief sought from only these non-

judicial defendants.

The convergence of all these factors with the fact that petitioners rely on three alternative grounds for abstention makes impossible the task of deciphering precisely what exception to the Cohen rule petitioners seek. Is it, perhaps, that all denials of Rule 12(c) motions are final orders, or is it only when the motion is based on Younger abstention, or is it only when all three grounds for abstention are raised? Is it when a Rule 12(c) motion is made in a case where there are some judicial defendants? Is it when the claims involve state court proceedings, or does it extend to challenges to administrative actions as well?

This case is thus an inappropriate vehicle for re-examining the final judgment rule; the ambiguity of

petitioners' claims could open the floodgates to piecemeal interlocutory appeals. There simply will be no end to the possible permutations unless this Court continues to hold, as it did in U.S. v. MacDonald, supra, that the final judgment rule is a rule, and not a balancing test to be applied to the individual facts of every case.

Both the judicial precedent set by this Court, requiring the application of the final judgment rule by category of case rather than by individual facts, and the individual facts of this case compel denial of certiorari.

II. The decision of the Court of Appeals dismissing petitioners' appeal is not in conflict with any decision of another federal court of appeals or of the Supreme Court of Pennsylvania.

Petitioners cite to this Court no case from any federal court of appeals or

from the Supreme Court of Pennsylvania which conflicts with the order dismissing petitioners' appeal as interlocutory. While petitioners repeatedly confuse the question of what constitutes a final order with the substance of the abstention issues that were before the district court, there is no dispute that the dismissal of petitioners' interlocutory appeal by the Court of Appeals is not in conflict with any judicial authority. The only other case

on point at any level of the judiciary, state or federal, is in accord with the decision in this case. Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co., 600 F. 2d 671 (7th Cir. 1979) (holding denial of motion to dismiss based on abstention was

nonappealable interlocutory order).

There is thus no authority under Rule 17.1(a) of the U.S. Sup. Ct. Rules, 28 U.S.C.A., for review of this case by writ of certiorari. When certiorari has been granted to review issues of finality, there has existed a conflict among the Circuits which served to elucidate the issue and which required resolution by this Court. See, e.g., U.S. v. Hollywood Motor Car, 458 U.S. 263, 264 fn. 1 (1982); U.S. v. MacDonald, 435 U.S. 850, 857 (1978); Abney v. U.S., 431 U.S. 651, 657 (1977); Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 24 (1966); DiBella v. U.S., 369 U.S. 121, 123 (1962). Cf., Nixon v. Fitzgerald, 457 U.S. 731 (1982) (certiorari granted absent a dispute among the Circuits to resolve issue of major public importance such as question

of immunity of ex-President of the United States).

III. Assuming arguendo that this Court grants certiorari on the issue of the final judgment rule, certiorari should not be granted on the propriety of the district court's denial of petitioners' motion for judgment on the pleadings.

The Court of Appeals did not address the issue of the propriety of the district court's refusal to exercise its discretionary power to abstain from hearing this case. The reasoning of the Court of Appeals was, as set forth in respondents' argument above, that since the district court's order was neither final nor within the collateral order exception of 28 U.S.C. §1291, it simply was not appealable. Nevertheless, the petitioners now seek from this Court a ruling on the merits of their abstention arguments. Respondents assert that,

in addition to the nonappealability of the abstention issue prior to trial, it would not be proper for this Court to address the propriety of the district court's action at this time because the issue was not reached by the Court of Appeals. In the alternative, if this Court undertakes such a substantive review, respondents assert that the district court's retention of jurisdiction and refusal to abstain was well within that court's discretionary power and does not merit the attention of this Court.

A. Certiorari should not be granted to review questions not decided below.

A writ of certiorari should not be granted to review a question which has been passed over or otherwise not addressed by the Court of Appeals. J.

Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 568 (1981); U.S. v. United Continental Tuna Corp. 425 U.S. 164, 181-182 (1976); Wood v. Strickland, 420 U.S. 308, 326-327 (1975). If this Court finds that the Court of Appeals was in error regarding the nonappealability of the district court order, it should then remand the case to the Court of Appeals for its consideration of the merits of the abstention issue. Contrary to the assertions of the petitioners in relying upon the footnote in Nixon v. Fitzgerald, 457 U.S. 731, 743 fn.23 (1982), the exercise of a federal court's discretionary power to abstain is not a pure question of law (Petition for Certiorari, p.31); a discretionary decision by definition turns upon the peculiar facts and circumstances of each individual case. This Court presently

has before it the detailed findings of the district court regarding the abstention decision. (Appendix 29a-53a). The Court of Appeals has not spoken on this matter, however, and this Court is therefore without the benefit of the Third Circuit's analysis of the issue. If this Court determines that review of the Court of Appeals decision is warranted, certiorari should be granted only on those issues decided by that court.

B. The decision of the district court was based upon its exercise of discretion and its specific factual findings and does not merit the attention of this Court.

Petitioners sought judgment on the pleadings in this action, claiming that the federal court was barred from adjudicating plaintiffs' claims because

of the doctrine of abstention as set forth in either Younger v. Harris, 401 U.S. 37 (1971), Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), or Burford v. Sun Oil Co., 319 U.S. 315 (1943). While petitioners assert for the first time here an abstention theory based on an amalgam of the three abstention doctrines, (Petition for Certiorari, p.31), respondents address in main only the propriety of the district court's Younger holding. As stated above, Pullman abstention was rejected at least in part because the district court found petitioners' two-year delay in filing their motion to be inexcusable and to cause an unwarranted delay in disposition. (Appendix 51a). The district court also refused to exercise its discretion under Burford because of the predominance of federal

constitutional issues and the lack of any specialized state regulatory agency entrusted to handle the state law issues, even if any such issues existed. (Appendix 51a-53a).

With regard to Younger abstention, the district court first held that the doctrine did not bar the damage action against only nonjudicial entities by the named plaintiffs whose individual state court proceedings had ended years ago. (Appendix 37a). Concerning the request for injunctive relief, the district court carefully followed the rulings of this Court holding that abstention is required only if state court proceedings afford plaintiffs an adequate opportunity to raise their constitutional claims. (Appendix 29a-34a). The district court addressed step by step the potentially available

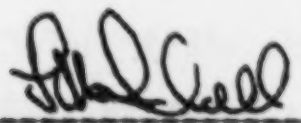
state court proceedings and the state judicial rulings interpreting those proceedings. The court found as to each stage that state remedies did not present an adequate opportunity in which to raise plaintiffs' constitutional claims. (Appendix 38a-47a).

Petitioners' request for writ of certiorari on the substance of the district court's holding is not based on the ground that the district court applied an incorrect legal standard. Rather, petitioners object to the court's exercise of discretion and its factual determinations concerning the available state procedures. This case thus presents no important issue of law worthy of this Court's attention.

CONCLUSION

No issue presented in this petition for writ of certiorari warrants the attention of this Court at this stage of the proceedings. The denial of the motion for judgment on the pleadings is clearly a nonappealable interlocutory order. No defendant in this action is immune from participation in a trial seeking injunctive relief and the question of whether abstention is required can be addressed adequately on appeal after final judgment. In addition, because the decision of the district court denying petitioners' motion was not reviewed by the Court of Appeals and strictly adhered to this Court's rulings on abstention, review of its order by writ of certiorari should be denied.

Respectfully submitted,



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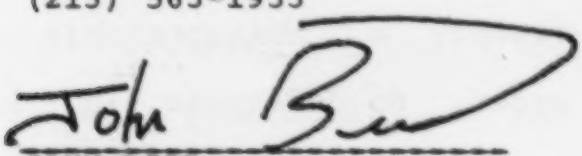

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